Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

[October 1994 Term]

CAPITAL WHOLESALE ELECTRIC, INC.,

Petitioner,

v.

McCARTHY CONSTRUCTION COMPANY, a California Corporation; MARK DIVERSIFIED, INC., a California Corporation; McCARTHY CONSTRUCTION/MARK DIVERSIFIED, INC., a Joint Venture; CECIL MARK; DAVID MARK; WILLIAM McCARTHY; UNITED PACIFIC INSURANCE COMPANY; RELIANCE INSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an arbitrator, who derives his authority to arbitrate a matter from a privately negotiated arbitration agreement which specifies that he shall decide the case by applicable federal law, exceeds his powers by rendering an award which does not follow applicable federal law.

2. Whether this court's holding in Volt Info Sciences v. Leland Stanford Jr. Univ., 489 U.S. 468 (1988) that private arbitration agreements should be enforced according to their terms, applies where parties explicitly limited the authority under which the arbitrator is to hear and decide the case.

CORPORATE DISCLOSURE STATEMENT

Petitioner, CAPITAL WHOLESALE ELECTRIC, INC., states that it has no parent companies, subsidiaries or affiliates that have issued shares to the public.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, CAPITAL WHOLESALE ELECTRIC, INC. (hereinafter petitioner), respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, entered in this case on March 9, 1995.

OPINIONS DELIVERED IN THE CASE

1. The decision of the United States Court of Appeals for the Ninth Circuit, Case No. 93-16578, was filed March 9, 1995, and is reprinted in full in the appendix hereto at App. 1 - App. 7.

2. The order and the judgment of the United States District Court, Eastern District of California, were rendered July 21, 1993, and are reprinted in full in the appendix hereto at App. 8 - App. 19.

3. The arbitrator's Corrected Final Decision and Award was rendered March 16, 1993 and is reprinted in full in the appendix hereto at App. 20 - App. 22.

4. The Arbitrator's Final Decision and Award was rendered March 4, 1993 and is reprinted in full in the appendix hereto at App. 23 - App. 32.

5. The Arbitrator's Decision and Award was rendered December 7, 1992, and

is reprinted in full in the appendix hereto at App. 33 - App. 57.

STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of California had jurisdiction of this matter pursuant to 40 U.S.C. § 270b of the Miller Act. The Ninth Circuit Court of Appeal had jurisdiction under 28 U.S.C. § 1291. The Ninth Circuit rendered its Memorandum of Decision March 9, 1995. This court has jurisdiction to review the Ninth Circuit Court of Appeal's Memorandum pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

40 U.S.C. § 270b provides:

> (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this act (citation) and who has not been paid in full therefore before the expiration of a period of 90 days after the date on which the last of the labor was done or performed by him or material was

furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him.

9 U.S.C. § 2 provides:

Validity, irrevocability, and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 10(a) provides:

Award of Arbitrators; vacation; grounds; rehearing.

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its

discretion, direct a rehearing by the arbitrators.

STATEMENT OF THE CASE

Respondents entered into a contract December 6, 1985 with the United States government for the purpose of performing works of improvement at McClellan Air Force Base in Sacramento, California, commonly known as the "Tech Center" project. Respondents simultaneously had a contract with the United States government at McClellan Air Force Base on a project commonly known as the "Communications Building" project. Respondents entered into separate subcontract agreements with Harakas & Sons for the purpose of performing the electrical subcontract work on each of these works of improvement. At the special request of Harakas & Sons, petitioner provided and delivered material to each jobsite, which material was used in the performance of the work of

improvement for which it had been ordered, and to which it was delivered. Harakas directed petitioner how to apply each payment it made to petitioner. Petitioner applied every payment pursuant to Harakas' instructions. The Communications Building project account at CAPITAL WHOLESALE was paid regularly and kept current. The Tech Center project account became past due. By July of 1987, the Tech Center account was past due in the amount of $571,835.75.

Petitioner contacted respondents regarding the delinquency of the Tech Center project account. At a meeting in July 1987, respondents negotiated a settlement with petitioner in which respondents agreed to pay petitioner $510,000.00 in full settlement of the outstanding balance, obtaining a discount of $61,835.75. The parties further agreed that petitioner would continue supplying materials to complete the project, but

would pre-approve each delivery with a designated McCARTHY/MARK person, so that respondents would be certain the materials were not diverted by Mr. Harakas. In return, respondents guaranteed payment to petitioner within 20 days for each purchase, if these procedures were followed. It was undisputed that petitioner complied with the contract, and properly preapproved all shipments. Respondents ceased paying petitioner according to the contract as soon as it received a large shipment of special fixtures. It did not pay for those fixtures, or any subsequent delivery.

Petitioner brought this action August 9, 1988 in the name of the United States of America pursuant to the explicit terms of 40 U.S.C. § 270b against McCARTHY CONSTRUCTION COMPANY, MARK DIVERSIFIED, INC., McCARTHY CONSTRUCTION/MARK DIVERSIFIED, INC., CECIL MARK, DAVID MARK,

WILLIAM McCARTHY, UNITED PACIFIC INSURANCE COMPANY, and RELIANCE INSURANCE COMPANY (hereinafter "respondents"). The complaint sought damages arising out of respondents' breach of contract, and pursuant to the Miller Act, as well as fraud. Petitioner filed its First Amended Complaint, alleging the same causes of action, October 13, 1989.

Respondents served their Answer and Amended Counter-Claims December 1, 1989. Respondents' counter-claims alleged fraud and conspiracy causes of action against petitioner. The counter-claims prayed that petitioner take nothing by its First Amended Complaint, and that respondents be awarded damages against petitioner suffered for delay in the "Tech Center" project.

After extensive discovery, the case was initially set for trial May 14, 1991. The trial date was continued on several

occasions. The parties ultimately negotiated a Stipulated Request for Stay of Trial and Referral of Matter to Binding Arbitration. Pursuant to the Arbitration Agreement, the parties limited the arbitrator's powers by stipulating that the arbitrator "shall decide this case by applicable federal law and decisional authority."

The arbitration hearing was held September 18-25, 1992, before the Honorable George E. Paras, retired state court judge. The arbitrator found that the July 1987 settlement contract was valid and binding, and that respondents' failure to pay constituted a breach of the July 1987 contract. The arbitrator also specifically found that there had been no fraud by either party and no conspiracy between petitioner and Harakas.

The arbitrator then offset petitioner's award under the contract,

stating as his grounds that respondent McCARTHY/MARK was entitled to damages, pursuant to its affirmative defense under the Miller Act of misapplication of funds alleged to have occurred prior to the July 1987 settlement. The arbitrator calculated McCARTHY/MARK's damages without taking into account the $61,835.75 discount that respondents had negotiated. The arbitrator also calculated the damages on the basis that all money petitioner received from Harakas should have been credited to the Tech Center, without accounting for the $100,000 + that was credited to respondents' other project, the Communications Building.

The undisputed evidence presented during the arbitration showed that all funds which Harakas & Sons had paid to petitioner, designated for the Communications Building, had been correctly applied to the Communications

Building project on respondents' behalf. The arbitrator awarded those funds back to respondents for not having been credited to the Tech Center. The net result was an award rendered March 16, 1993 against petitioner, in the sum of $226,500.64, plus costs and interest, at 7% per annum, from January 1, 1993.

Petitioner brought a motion, May 3, 1993, to vacate, or in the alternative, to modify or correct the award of the arbitrator on the grounds that the arbitrator exceeded his powers. The district court denied this motion July 21, 1993, and entered judgment pursuant to the arbitrator's award.

Petitioner timely filed a Notice of Appeal to the Ninth Circuit August 9, 1993. During oral argument in the Ninth Circuit Court of Appeals, there was extensive discussion regarding the arbitrator's power to render an award

which did not comply with applicable federal law despite the parties' agreement that the arbitrator's powers were limited in the arbitration agreement to deciding the case by applicable federal law. Petitioner argued that this was not merely a situation where the arbitrator "got it wrong," but a situation in which the arbitrator failed to abide by the terms of the Arbitration Agreement.

The Ninth Circuit affirmed the judgment March 9, 1995.

ARGUMENT

There exists a strong public policy favoring arbitration. This public policy is becoming more and more at risk as parties are beginning to experience the uncertainty that is often associated with arbitration, and the realization that there is virtually no recourse, no matter how egregious the situation, from an arbitration award. Only by allowing the

parties to set the stage and define the limits of the arbitrator's powers, and allowing those parties to get redress when the arbitrator fails to follow those limits, will the forum of arbitration be a viable alternative to the court system.

The Ninth Circuit Court of Appeals, in Western Employer's Ins. Co. v. Jefferies & Co., 958 F.2d 258 (9th Cir. 1992), recognized that an arbitrator's failure to abide by the terms of an arbitration agreement requires that the arbitration award be vacated. In Western Employers, the arbitration agreement required the arbitrators to make findings of fact and conclusions of law. The arbitrators rendered an award without including any findings of fact nor any conclusions of law in their award. The Ninth Circuit vacated the arbitration award, relying, in part, on this court's findings in Volt Info. Sciences v. Leland

Stanford, Jr. Univ., 489 U.S. 468, 478 (1988), in which this court held that the Federal Arbitration Act "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." The court stated:

> We also believe that the circumstances underlying this dispute between Western and Jefferies implicate traditional principles of contract law, which are recognized in the Federal Arbitration Act. Under these traditional principles, Western had a right to receive what it bargained for - arbitration according to the terms of its contract with Jefferies. By failing to abide by the contract from which NASD derived its power to hear the dispute, the arbitrators exceeded their powers under 9 U.S.C. § 10(d) [now 10(a)(4)] of the Act. (Western Employers Ins. v. Jefferies & Co., 958 F.2d 258, 260, supra.)

This court, in Volt, 489 U.S. 468, supra, made it clear that the principal purpose of the Federal Arbitration Act was to ensure that private arbitration

agreements are enforced according to their terms. The court noted that parties are generally free to structure their arbitration agreements as they see fit. The court then stated, "By permitting the courts to 'rigorously enforce' such agreements according to their terms (citation), we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA." (Volt Info. Sciences v. Leland Stanford, Jr. Univ., 489 U.S. 468, 479, supra.)

In the case at bar, the parties, facing another continuance of the trial by the court, entered into a stipulation to submit the matter to arbitration. Among the terms set forth in their Stipulated Request for Stay of Trial and Referral of Matter to Binding Arbitration, dated February 14, 1992, was the clause "The arbitrator shall decide this case by

applicable federal law and decisional authority ..." Implicit in this clause is the requirement that the law be applied correctly. To interpret the clause otherwise would make it meaningless.

This case presents an issue of first impression for this court. While this court has ruled on various terms of an arbitration clause in the past, this case presents the first time, since arbitration became so wide-spread, as it has in the past decade, that the parties have attempted to limit, by agreement, the scope of the arbitrator's authority.

The trend in both state and federal courts has been that absent such limitation, the arbitrator's authority is very broad indeed. (See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc. (1995) ____ U.S. ____ (95 Daily Journal D.A.R. 2896), and AMD v. Intel (1994) 9 Cal.4th 362.)

If arbitration is to be widely used, and the courts currently are encouraging arbitration to lessen the backlog in the trial courts, the parties must have the ability to create some predictability of outcome. Arbitration may work en mass for small cases where both the participants and counsel can agree that any occasional aberration is outweighed by the benefit of speed and convenience for many cases. For arbitration to work on complex cases that are of major importance to the parties and counsel, the parties must be able to define, in advance, the parameters of the arbitration, and define the scope of the arbitrator's powers. It is unlikely that parties will agree to arbitrate cases if they believe that their very existence and/or livelihoods may depend on the whim or caprice of the arbitrators, and that they will have no recourse.

In this case, the parties agreed to arbitrate a case that both sides considered to be of major importance to them. They specifically and intentionally attempted to circumscribe the arbitrator's authority. The arbitrator ignored that circumscription. This case did not call for grey area interpretation of law. The applicable law was well established, and agreed to by both sides.

Petitioner submits that for arbitration to have a meaningful place in significant commercial disputes, the parties must have a way to reduce the risk of an aberrant award. In light of the California Supreme Court's ruling in AMD v. Intel, supra, 9 Cal.4th 362, the parties must have a way to define the limits of the arbitrator's authority. This case presents, for the first time, the parties' attempt to provide a very

simple limitation on the arbitrator's authority.

A requirement that an arbitrator correctly follow applicable federal law should be accorded the same deference as any other clause defining the arbitrator's powers in an arbitration agreement. Only by giving effect to the clause can the contractual rights and expectations of the parties be met. By failing to follow the clause, the arbitrator failed to meet his obligations as specified in the contract, and exceeded his powers pursuant to 9 U.S.C. § 10(a).

Specifically, petitioner's complaint alleged a cause of action for breach of contract, a cause of action under the Miller Act, and a cause of action for fraud. The prayer sought damages in the amount of $215,000 on the breach of contract cause of action, or, in the alternative, if the court found that no

contract existed, the prayer sought damages in the amount of $263,378.02 on the Miller Act and fraud causes of action. Respondent's counter-claims against petitioner alleged causes of action for fraud and conspiracy. The counter-claim prayed that petitioner take nothing by its First Amended Complaint, and that respondents be awarded damages against petitioner for damages suffered for delay in the "Tech Center" project. No other compensatory damages were sought against petitioner by respondents. The only other compensatory damages sought by respondents was $560,000 for breach of contract against Harakas only, for which respondents obtained a judgment, and which is not in issue here.

In July 1987, the parties negotiated a settlement in the amount of $510,000 for materials which had been supplied to the job through that date up to that time.

Petitioner had asserted its Miller Act rights against respondents for $571,835.75 which was unpaid for materials supplied. Pursuant to the agreement, respondents agreed to pay, and petitioner agreed to accept, $510,000 in full settlement of the claim.

The parties further agreed at that time that if petitioner would accept payment of $510,000 for the amount owed them, and if petitioner would continue selling to the project, and pre-approve each delivery with a designated McCARTHY/MARK person, so that respondents could be certain that those materials were not diverted by Mr. Harakas, then respondents would guarantee payment within 20 days. It was further undisputed that petitioner complied with the contract and pre-approved all shipments. Respondent ceased paying according to the contract as

soon as a shipment of fixtures had been received by it.

There is no doubt that the arbitrator did not correctly apply federal law to the case at bar. The arbitrator found the contract entered into between petitioner and respondents to be valid, in force, and therefore in full settlement of the claim. He awarded petitioner its damages pursuant to respondents' breach of that contract.

The arbitrator did not reach petitioner's Miller Act cause of action, but he did reach respondents' affirmative defense to that Miller Act cause of action. He not only offset the damages which he awarded petitioner on the contract cause of action, but granted a positive award to respondents on that affirmative defense.

The arbitrator should never have addressed the Miller Act cause of action at all after finding the contract valid,

let alone award affirmative relief on respondents' affirmative defense to the Miller Act claim. Such an outcome is contrary to federal law because no such action even exists.

There is no provision in the Miller Act for a general contractor to sue a material supplier for misapplication of funds. It is purely an equitable affirmative defense within the Miller Act. It cannot stand on its own. (United States, etc. v. Wiring, Inc., 646 F.2d 1037, 1042 (5th Cir. 1981); U.S. for West Chester Electric v. Sentry Ins., 774 F.2d 80, 84 (4th Cir. 1985); Silverhill Concrete Corp. v. Thomason Industries, 556 F.Supp. 291, 294 (D.C. 1982).)

Even if the Miller Act equitable allocation set forth in St. Paul Fire & Marine Ins. Co. v. U.S., 309 F.2d 22 (8th Cir. 1962) applied, the arbitrator incorrectly applied the concept, in

violation of the parties' agreement to arbitrate. The law set forth in St. Paul acknowledges the inequity of requiring a general contractor to pay for material twice where the materialmen knew, or should have known, that it had already received funds from the general which paid for those particular supplies. On the other hand, the general must pay for supplies once. Petitioner never received payment for $61,835.75 worth of materials for which respondents had negotiated a reduction on the balance owed on the Tech Center project. Petitioner gave respondents $61,835.75 worth of materials for free in order to resolve their differences. The award holds that petitioner had misappropriated those funds, and required petitioner to pay those funds back to respondents. The award gives respondents a windfall of $61,835.75 because it requires petitioner

to pay those funds to respondents, when respondents never paid those funds to petitioner in the first place.

In addition, the arbitrator failed to apply federal law regarding the payments made on the other project for which petitioner was supplying materials to Harakas for McCARTHY/MARK, the Communications Building project. It was undisputed that petitioner had correctly applied over $100,000 in payments it received from Harakas to the Communications Building project on respondents' behalf. The arbitration award never mentioned the Communications Building project. It was wholly ignored by the arbitrator, despite being discussed at length in the hearings to correct the award. The judgment required that all funds properly credited by petitioner to the Communications Building project be reapplied to the Tech Center account, as

if they had been misappropriated. That result would cause petitioner to be required to give all of the electrical materials for the Communications Building project to respondents for free, and leave petitioner without a remedy to obtain payment on the Communications Building project. This outcome is contrary to the applicable federal law.

By failing to properly apply federal law, the arbitrator failed to arbitrate this dispute according to the terms of the parties' arbitration agreement. In so doing, the arbitrator exceeded his authority under 9 U.S.C. § 10(a)(4). Petitioner had a right to arbitration according to the terms for which it contracted. The award should have been vacated.

The decision of the Ninth Circuit undermines the strong public policy favoring arbitration. If parties to a

privately negotiated arbitration agreement cannot rely on the court's enforcing all clauses they put into that agreement according to their terms, the parties are going to be less and less willing to resort to alternative dispute resolution. For this reason, as well as the reasons discussed above, the decision of the Ninth Circuit in this case must be reversed if arbitration is to remain a viable and desirable means of resolving significant disputes.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully Submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CAPITAL WHOLESALE ELECTRIC, INC. Plaintiff-Counter-Defendant-Appellant, vs. McCARTHY CONSTRUCTION; MARK DIVERSIFIED, INC., Defendants-Counter-Claimants-Appellees.	No. 93-16578 D.C. No. CV-88-1010-LKK MEMORANDUM*

Appeal from the United States District Court for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted 2/16/95
San Francisco, California

Before: FLETCHER, PREGERSON, and RYMER, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

I

Capital Wholesale Electric, Inc. appeals the district court's refusal to vacate an arbitration award that Capital contends exceeded the arbitrator's powers and incorrectly miscalculated figures. We have jurisdiction, 28 U.S.C. § 1291, and we affirm.

Capital argues that the arbitration award exceeded the arbitrator's powers because the issues submitted were confined to the complaint and counterclaims, neither of which entitled McCarthy to compensatory damages in the form of an offset against Capital's award under the July 1987 settlement. 9 U.S.C. § 10(b)(4). Rather, Capital contends that it brought a contract claim and a Miller Act claim alternatively, such that when the arbitrator found that the 1987 settlement contract was valid, he could not offset post-July 1987 damages to Capital for breach of contract with pre-

July 1987 funds reallocated under the St. Paul[1] doctrine. Thus, Capital submits, once the contract was upheld, its alternative cause of action under the Miller Act was mooted and McCarthy's defense of misapplication of funds, which is a Miller Act defense, was mooted along with it. We disagree.

The parties' stipulation referred "this matter" to binding arbitration. McCarthy's answer and counterclaim raised the issue of diverting funds to other accounts for payment of other debts, and its counterclaim sought damages on this theory. The St. Paul issue, including whether the July 1987 contract settled all pre-July 1987 disputes, was fully developed in the course of the proceedings. Therefore, Capital's argument boils down to whether the

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[1] St. Paul Fire and Marine Ins. Co. v. United States for the Use of Dakota Elec. Supply Co., 309 F.2d 22 (8th Cir. 1962), cert. denied, 372 U.S. 936 (1963).

arbitrator was correct as a matter of law in deciding to award affirmative relief to McCarthy and to offset that award against Capital's recovery of damages. While we review the district court's denial of a motion to vacate de novo, "[a]n arbitrator's decision must be upheld unless it is completely irrational or it constitutes a manifest disregard of law." Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir. 1991) (citations and quotations omitted). The arbitrator found that McCarthy did not learn of Harakas's misapplied payments until after it had entered into the July 1987 contract, and that McCarthy could not have bargained away legal rights it did not know it had. Given the equitable principles on which the St. Paul doctrine is based, we cannot say that the

arbitrator's decision was in manifest disregard of the law.[2]

II

Capital next contends that the district court should have modified or corrected the award under 9 U.S.C. § 11(a) so that Capital gets back the $61,835.75 discount it negotiated with McCarthy in the July 1987 settlement. Otherwise, Capital argues, it will be reimbursing McCarthy for materials for which McCarthy never paid.

The arbitrator, however, considered the $61,835.75 discount and rejected Capital's position. He reasoned that the contract was valid, that Capital had given a discount in exchange for prompt payment, and that the St. Paul restitution was independent of that bargained-for exchange. As he obviously intended to

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[2] We decline to consider Capital's further point that the St. Paul doctrine cannot be used as a counterclaim, but rather is limited to an affirmative defense, because it was raised for the first time in its reply brief.

make the award against Capital, we cannot say that there was an "evident material miscalculation of figures." 9 U.S.C. § 11(a).

III

Capital argues that the arbitrator made another material miscalculation, which the district court should have corrected, when he failed to reduce McCarthy's St. Paul award by taking into account payments Harakas had made to the Communications Building project. The arbitrator's decision was based on the evidence before him and the post-hearing submissions of the parties, which included recalculations of the award to reflect the effect of credits on the Communications Building project. Although that project was not mentioned in his decision, the arbitrator has no obligation to explain the basis of his decision and we cannot say that he made an "evidence mathematical miscalculation" rather than an

interpretation of the law and facts as he saw them.

IV

We decline McCarthy's request for attorney's fees under 28 U.S.C. § 1912 as Capital's appeal is not frivolous.

AFFIRMED.

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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. McCARTHY CONSTRUCTION COMPANY, INC., a California corporation; MARK DIVERSIFIED, INC., a California corporation; McCARTHY CONSTRUCTION/ MARK DIVERSIFIED, INC., a Joint Venture; CECIL MARK; DAVID MARK; WILLIAM McCARTHY; UNITED PACIFIC INSURANCE COMPANY; RELIANCE INSURANCE COMPANY; and Does 1 through 100, Defendants.	No. CIVS-88-1010-LKK-JFM ORDER DENYING MOTION OF CAPITAL WHOLESALE ELECTRIC COMPANY TO VACATE OR MODIFY ARBITRATOR'S AWARD AND CONFIRMING ARBITRATOR'S AWARD AGAINST CAPITAL WHOLESALE COMPANY

McCARTHY CONSTRUCTION/ MARK DIVERSIFIED, INC., a Joint Venture,	)	
CounterClaimants,	)	
vs.	)	
CAPITAL WHOLESALE ELECTRIC COMPANY; H & S ELECTRIC COMPANY; HARAKAS AND SONS ELECTRIC COMPANY; NICHOLAS HARAKAS; and DOES 1 through 10,	)	Date: 6/21/83 Time: 10:00 Dept: 1
Counter-Defendants.	)	

The motion of plaintiff and counter-defendant CAPITAL WHOLESALE ELECTRIC COMPANY ("CAPITAL"), to vacate, modify or correct the arbitrator's award came on regularly for hearing on June 21, 1993, before the Honorable Lawrence K. Karlton in Courtroom #1 of the above-entitled court. CAPITAL appeared by its counsel, Howard M. Hoffman. Defendants and counterclaimants, McCARTHY CONSTRUCTION/ MARK DIVERSIFIED, INC., a joint venture ("McCARTHY/MARK"), appeared by its

counsel, Diepenbrock, Wulff, Plant & Hannegan.

The court, having read all papers in support of and in opposition to the motion, and having heard oral argument, announced its disposition of the motion and its reasons therefor into the record and ordered McCARTHY/MARK, as the prevailing party, to prepare a formal order consistent therewith.

Pursuant to 9 U.S.C. section 10, CAPITAL moves to vacate or modify the arbitration award issued against it, arguing that the arbitrator exceeded his powers as defined in the arbitration agreement. See e.g., W. Employers Ins. v. Jefferies & Co., 958 F.2d 258 (9th Cir. 1992). Specifically, CAPITAL asserts that the arbitrator violated the agreement by failing to: (1) follow federal law, (2) comply with the pre-trial order, and (3) follow the Federal Rules of Evidence.

As the party seeking to vacate the award, CAPITAL bears the burden of demonstrating that the arbitrator ignored the parties' agreement. See Sheet Metal Workers Int'l Ass'n v. Kinney Air Conditioning, 756 F.2d 742, 745 (9th Cir. 1985). CAPITAL has failed to meet this burden. On the contrary, the record indicates that the arbitrator specifically interpreted and applied the provisions included in that agreement.

The text of the award includes citations which indicate that the arbitrator based his decision on federal law. CAPITAL disagrees with the arbitrator's interpretation of the law. However, CAPITAL cannot obtain a de novo hearing by converting an argument that the arbitrator misapplied the law into a claim that the arbitrator exceeded his powers. The court's review of the arbitrator's application of law is severely limited. Lundgren v. Freeman, 307 F.2d 104, 110

(9th Cir. 1962), and the award will be vacated only upon a showing of manifest disregard of the law. Coast Trading Co. v. Pac. Molasses Co., 681 F.2d 1195, 1197 n. 2 (9th Cir. 1982). "It is not the court's role to determine whether the arbitrator has reached the same result the court would have reached." Local Joint Executive Bd. v. Riverboat Casino, Inc., 817 F.2d 524, 527 (9th Cir. 1987).

Similarly, the hearing transcript indicates that the arbitrator applied the pretrial order when CAPITAL objected to McCARTHY/MARK's summary exhibits. The record indicates that the arbitrator reviewed the order, denied McCARTHY/MARK permission to submit some exhibits, and determined that others constituted admissible summaries and/or indexes of materials within the meaning of the pretrial order. Moreover, the arbitrator provided CAPITAL time, albeit brief, to review the summaries and a substantial

period of time following the hearings to conduct further review.

The transcript also reveals that the arbitrator followed the Federal Rules of Evidence. CAPITAL asserts that McCARTHY/MARK's summaries were inadmissible because they were not authenticated. However, summaries submitted pursuant to Federal Rules of Evidence 1006 need not be authenticated. See Weinstein's Evidence 1006-13,14.

Under these circumstances, and pursuant to its limited power for review of the legal conclusions of an arbitrator, the court cannot conclude that the arbitrator manifestly disregarded federal law, the pretrial order, or the Federal Rules of Evidence.

CAPITAL also moves, pursuant to 9 U.S.C. section 11, to modify or correct the arbitration award based on an alleged material miscalculation. CAPITAL asserts that the arbitrator should have allowed it

to rescind the discount that it provided pursuant to the parties' earlier settlement agreement, and that the arbitrator erred when he failed to adjust the award to reflect credits that it asserts should have been applied to McCARTHY/MARK's Communications Building Project.

These alleged errors do not constitute a "miscalculation of figures" as is required in order to modify an arbitration award. Rather, they represent the arbitrator's interpretation of the law and facts after demonstrated consideration of the partes' post-hearing briefs. Moreover, the arbitrator need not disclose the basis for his award or rejection of a party's arguments. Atlanta-Tomberlin, Inc. v. E. Band of Cherokee Indians, 672 F. Supp. 887, 889 (W.D.N.C. 1987).

Because CAPITAL has failed to show that the arbitrator exceeded his authority by failing to follow the provisions of the

parties' arbitration agreement or that he made a material miscalculation of figures, for the all above reasons, its motion to vacate or modify the arbitration award is denied.

IT IS SO ORDERED.

Further, the motion of McCARTHY/MARK for an order confirming an arbitration award and entry of judgment against CAPITAL, H & S ELECTRIC COMPANY, HARAKAS and SONS ELECTRIC COMPANY, and NICHOLAS HARAKAS was heard on May 3, 1993, and granted against all counter-defendants except CAPITAL. The court denied the motion as to CAPITAL, pending the outcome of CAPITAL's motion to vacate or modify the arbitrator's award.

After the court's denial of CAPITAL's motion to vacate or modify the arbitrator's award, McCARTHY/MARK renewed its motion for an order confirming the arbitrator's award and entry of judgment against CAPITAL. Proof having been made

to the satisfaction of the court that the motion should be granted against CAPITAL, and good cause appearing therefor,

IT IS ORDERED:

1. That the Arbitrator's Decision and Award dated December 7, 1992, as amended by the Arbitrator's Final Decision and Award, dated March 4, 1993, and corrected by the Arbitrator's Corrected and Final Decision and Award, dated March 16, 1993, is confirmed in all respects and that judgment be entered in favor of McCARTHY/MARK and against CAPITAL in conformity with the award.

2. That McCARTHY/MARK, a joint venture, recover judgment against CAPITAL for the sum of $226,500.44, plus interest at 7 percent (7%) per annum, from January 1, 1993, and costs of $7,501.26.

Dated: July 20, 1993.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
U.S. DISTRICT COURT

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Attorneys for Defendants and CounterClaimants UNITED PACIFIC INSURANCE COMPANY; RELIANCE INSURANCE COMPANY; McCARTHY CONSTRUCTION/MARK DIVERSIFIED, a Joint Venture; CECIL MARK; DAVID MARK; AND WILLIAM McCARTHY

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. McCARTHY CONSTRUCTION COMPANY, INC., a California corporation; MARK DIVERSIFIED, INC., a California corporation; McCARTHY CONSTRUCTION/ MARK DIVERSIFIED, INC., a Joint Venture; CECIL MARK; DAVID MARK; WILLIAM McCARTHY; UNITED PACIFIC INSURANCE COMPANY; RELIANCE INSURANCE COMPANY; and Does 1 through 100, Defendants.	No. CIVS-88-1010-LKK-JFM JUDGMENT AGAINST CAPITAL WHOLESALE ELECTRIC COMPANY

McCARTHY CONSTRUCTION/ MARK DIVERSIFIED, INC., a Joint Venture,	)
CounterClaimants,	)
vs.	)
CAPITAL WHOLESALE ELECTRIC COMPANY; H & S ELECTRIC COMPANY; HARAKAS AND SONS ELECTRIC COMPANY; NICHOLAS HARAKAS; and DOES 1 through 10,	)
Counter-Defendants.	)

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The court having entered its Order Denying Motion of CAPITAL WHOLESALE ELECTRIC COMPANY to Vacate or Modify Arbitrator's Award and Confirming Arbitrator's Award Against Capital Wholesale Company.

IT IS HEREBY ORDERED AND ADJUDGED that McCARTHY CONSTRUCTION/MARK DIVERSIFIED, INC., a joint venture, recover judgment against CAPITAL WHOLESALE ELECTRIC COMPANY for the sum of $226,500.44, plus interest at 7 percent

(7%) per annum, from January 1, 1993, and costs of $7,501.26. This order is stayed pending resolution of Capital Wholesale's motion to stay currently set for hearing on August 9, 1993.

Dated: July 20, 1993

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
U.S. DISTRICT COURT

GEORGE E. PARAS
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Arbitrator

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. McCARTHY CONSTRUCTION COMPANY, et al., Defendants.	No. CIVS-88-1010-LKK-JFM ARBITRATOR'S CORRECTED FINAL DECISION AND AWARD
McCARTHY CONSTRUCTION COMPANY, et al., Counter-Claimants, vs. CAPITAL WHOLESALE ELECTRIC COMPANY, et al., Counter-Defendants.	

After my Final Decision and Award dated 3/4/93, and pursuant to my reservation of jurisdiction therein to

correct arithmetical error, CAPITAL WHOLESALE ELECTRIC COMPANY (CW) requested that I correct the interest figure awarded against it from the inaccurate $82,250.90 to the accurate $62,250.90. McCARTHY-MARK (MARK) requested a recalculation which compounds the awarded interest.

There will be no compounding. But the requested correction is appropriate. In the process of reviewing both earlier decisions, however, I noticed yet another error in calculation, which I must also correct. The $229,045.02 allowed to CW is as of 1/1/88 (see page 3, line 1 of the 12/7/92 Award). The $388,054.54 originally allowed to MARK (see page 12, line 20 of the 12/7/92 Award) and adjusted to $377,261.42 (see page 6, line 4 of the 3/4/93 Award) is as of 1/1/87 (see page 12, line 22 of the 12/7/92 Award). The set-off did not apply until the St. Paul obligation had been in existence for one year after its maturity.

Accordingly, MARK should receive interest on $377,261.42 from 1/1/87 to 1/1/88; then after the set-off, interest on $148,216.40 from 1/1/88 to 12/31/92, all at 7% per annum. The first year's interest is $26,408.30 and the next five years interest is $51,875.74; the total principal and interest as of 12/31/92 is $226,500.44; and this final amount is awarded against CW and shall draw interest at 7% per annum from and after 1/1/93 as provided in the 3/4/93 Award.

The award against the Harakas entities remains as rendered on 3/4/93.

Dated: March 16, 1993.

/s/ George E. Paras
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Arbitrator

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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. McCARTHY CONSTRUCTION COMPANY, et al., Defendants.	No. CIVS-88-1010-LKK-JFM ARBITRATOR'S FINAL DECISION AND AWARD
McCARTHY CONSTRUCTION COMPANY, et al., Counter-Claimants, vs. CAPITAL WHOLESALE ELECTRIC COMPANY, et al., Counter-Defendants.	

After my Decision and Award dated 12/7/92, and pursuant to my invitation and reservation of jurisdiction therein

contained, CAPITAL WHOLESALE ELECTRIC COMPANY (CW) filed a Motion to Correct the Award. McCARTHY-MARK (MARK) filed a Cost Bill.[1] Supplemental briefing has been submitted by both sides. A hearing was held on 2/2/93. The issues on which the primary focus is placed are (1) allowance of pre-judgment interest and the rate thereof, (2) proper calculation of St. Paul liability of CW to MARK, (3) the $51,835.75 difference between the $510,000 paid by MARK to CW on 7/27/87 and the $561,835.75 actually then owed CW for Tech-Lab material supplied to Harakas, and (4) $10,793.42 claimed by CW to have actually been paid on Tech-Lab invoices but erroneously not credited by me so as to reduce CW's liability. I now render this, my final award, subject only to correction for arithmetical error, if any.

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[1] The Cost Bill issue is resolved by my separate ruling rendered concurrently herewith.

I. PRE-JUDGMENT INTEREST

I am satisfied from the briefing and the authorities submitted to me that pre-judgment interest should be awarded in order fully to compensate MARK. I also feel the interest rate may properly be determined with reference to California law. What I did erroneously, however, was to apply a 10 percent rate pursuant to Civil Code §3289(b), which is clearly applicable only to awards based on contract. I should have applied the 7 percent rate of Article XV Section 1 of the California Constitution, the legal rate for a loan or forbearance of money not involving contracts. The monetary award here in favor of MARK and against CW is grounded in statutory federal law; in no way can it be said that the Award involved a matter of contract between the two. On the contrary, the only contract between them was that of 7/27/87, which I found valid and which I enforced. The

right to interest here stems from the statutory (St. Paul) obligation to apply payments received in a certain way, itself a by-product of the Miller Act rights accorded a supplier of materials in a federal project. I will therefore modify my calculations to reflect a 7 percent annual rate of interest.[2]

II. ST. PAUL LIABILITY

My original calculations were based upon Trial Exhibit G, a chart showing month by month the dollar amounts of material sold by CW to Harakas for Tech-Bilt, the amounts of money paid to Harakas by MARK, the amounts paid to CW by Harakas, etc. After reading and absorbing the methodology involved in my application of St. Paul principles to this case, MARK

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[2] Interestingly, any interest on the Award of $229,045.02 to CW against MARK, would have been at a 10 percent rate, because based on the 7/27/87 contract. But it is of no favorable (to CW) consequence here, since that Award sets off against the amount awarded MARK and reduces the principal of MARK's Award on which interest runs.

submitted Exhibit G-1, a modified version of Exhibit G reflecting my methodology and correcting any errors of mine in application of funds paid by Harakas to CW. The net result is essentially the same, however; $388,054.84 is the principal amount which is owing to MARK from CW pursuant to a St. Paul analysis, but before adjusting for errors contained in Exhibit G-1.

I here address parenthetically CW's argument that it is inconsistent and incorrect to enforce the 7/27/87 contract and at the same time allow a St. Paul recovery to MARK, that a prerequisite to St. Paul recovery is a finding that the 7/27/87 contract is invalid, and that the 7/27/87 contract is an Accord and Satisfaction unless found void. Respectfully, I disagree. When CW and MARK met and negotiated shortly before and on 7/27/87, they did so in good faith. MARK was not, and had no time to become,

aware of St. Paul rights; all MARK knew was that CW had not been paid by Harakas and would deliver no more material vitally and swiftly needed for Tech-Bilt, unless payment was forthcoming. In allotting good faith to CW, I must concede that CW knew full well that it had received hundreds of thousands of MARK-derived dollars from Harakas which it had credited to accounts other than Tech-Bilt; but I do not attribute to CW any knowledge that its allocation of such funds was in violation of any rights of MARK. CW's motive of self-interest at MARK's expense does not per se show bad faith, and on this score I have given CW the benefit of any doubt.

Thus neither CW nor MARK perceived the 7/27/87 contract as anything but a legitimate business transaction motivated by expediency. MARK paid Harakas' debt to CW, which Harakas should have paid all along, and CW was willing to give a 10 percent discount for immediate and

painless cash. That contract I have upheld.

Entirely independently of that valid 7/27/87 contract, a different and independent right and obligation under St. Paul had accrued and was in existence, unknown to either obligee or obligor thereunder. It was not discovered until months later, presumably when MARK retained counsel. There is no way I can see that MARK should be held to have relinquished this unknown right to redress for an unknown legal wrong theretofore committed by CW. It is this latter wrong for which I have allowed compensation to MARK, and for it alone. Accord and satisfaction does not apply.

III. <u>THE $51,835.75 DIFFERENCE</u>

The discussion under II applies to this matter. I well understand the argument that being forced to pay MARK under St. Paul makes a surrender of the $51,835.75 seem like rubbing salt in the

wound. But it cannot change the reality that the 7/27/87 deal was an honest business deal between two victims of Harakas' mistakes. That deal should not be disturbed simply because a separate legal doctrine bestowed upon MARK the right to recover from CW.

IV. THE $10,793.42

CW has effectively demonstrated that amounts totalling $10,793.42 were in fact applied to the Tech-Lab project by CW as shown by MARK's own exhibits. This aggregate sum reduces the $388,054.84 to $377,261.42, and this latter figure will be used for the final award.

V. FINAL AWARD

CW is entitled to payment from MARK, pursuant to the contract of 7/27/87, of $229,045.02. MARK is entitled to payment from CW, pursuant to St. Paul, of $377,261.42. After set-off, MARK is entitled to the difference of $148,216.40, together with interest thereon at 7

percent per annum from and after 1/1/87. Interest up to and including 12/31/92 is $82,250.90, making the total award $230,467.30 plus further interest thereon at 7 percent per annum from and after 1/1/93 until payment or conversion of the Award into a judgment. MARK in addition shall recover costs in the sum of $7,501.26.

The foregoing award is in favor of McCARTHY CONSTRUCTION COMPANY, a California corporation, MARK DIVERSIFIED, INC., a California corporation, and McCARTHY CONSTRUCTION/MARK DIVERSIFIED, INC., a Joint Venture, and against CAPITAL WHOLESALE ELECTRIC COMPANY, a Corporation.

Independently, there is awarded in favor of McCARTHY CONSTRUCTION COMPANY, a California corporation, MARK DIVERSIFIED, INC., a California corporation, and McCARTHY CONSTRUCTION/MARK DIVERSIFIED, INC., a Joint Venture, against HARAKAS & SONS ELECTRIC COMPANY, H & S ELECTRIC

COMPANY, and NICHOLAS HARAKAS, individually, $629,166.00 plus interest thereon at 10 percent per annum from and after 7/1/87, plus costs in the sum of $7,501.26.

Dated: March 4, 1993.

/s/ George E. Paras
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Arbitrator

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. McCARTHY CONSTRUCTION COMPANY, et al., Defendants.	No. CIVS-88-1010-LKK-JFM ARBITRATOR'S DECISION AND AWARD
McCARTHY CONSTRUCTION COMPANY, et al., Counter-Claimants, vs. CAPITAL WHOLESALE ELECTRIC COMPANY, et al., Counter-Defendants.	

Counter-Defendants (henceforth "CW") initiated this Miller Act action to bring about collection of $229,045.02 allegedly

due for electrical material and equipment supplied after 7/27/87 to a federal construction project ("Tech-Lab") in which Counter-Claimants (a joint venture -- henceforth "MARK") were the prime contractor. The material was sold by CW to Nick Harakas and/or one or more of his several alter ego entities (henceforth "HARAKAS"), the electrical subcontractor. CW also seeks interest and attorneys' fees against MARK.

MARK asserts against CW a claim for $510,000 paid by MARK pursuant to a settlement reached on or about 7/27/87, when CW asserted Miller Act rights against MARK for a total of $571,835.75 ($524,606.42 and $47,229.33) in accrued invoices for electrical materials theretofore delivered to HARAKAS for the Tech-Lab project, and not paid. The settlement included payment to CW of the $510,000 in full satisfaction of the $571,835.75, and a commitment by MARK that

he would pay future invoices of CW pre-approved by MARK which ultimately calculated to the $229,045.02. MARK also claims interest and attorneys' fees.

I. THE $229,045.02 CLAIM OF CW

Essentially this is undisputed. MARK in fact offers to set it off against his claimed $510,000. After the 7/27/87 agreement, the material was in fact furnished and placed into the project after prior approval of each item by MARK. Payment should be made irrespective of other considerations, even if the agreement were void (which it is not). Accordingly the claim is established as valid, and $229,045.02 will be awarded CW as a set-off against sums hereinafter found due to MARK on the counter-claim, together with interest thereon at 10% per annum (CC §3289(b)) from and after 1/1/88. This calculates to $114,522.50 of interest through 12/31/92, and total principal and interest of $343,567.52.

II. THE $510,000.00 CLAIM OF MARK

This is to be distinguished from the St. Paul type claim to be covered later. Here, MARK seeks a decision that the 7/27/87 payment was procured by fraud on the part of CW, hence the entire contract is void; and payment should be restored in full, less only the $229,045.02 for electrical materials furnished after the deal was struck. The fraud claim is founded upon an asserted duty to disclose the past financial difficulties of HARAKAS, his huge former unpaid bills to CW on other projects, the fact of a personal loan by CW to HARAKAS in March 1986 to help him stay in business, and other such matters.

I do not find any affirmative duty to disclose known facts under the circumstances. There was no fiduciary relationship; in fact, the parties were clearly dealing at arm's length (the suggestion of fiduciary duty in McGraw v.

Milcor (1945) 149 F.2d 301 notwithstanding). Putting aside St. Paul considerations, these are hard-hitting businessmen who give no quarter and seek none. Absent affirmative fraud, they safeguard their self-interest; leaving it to their counterparts to do the same. CW was given rights under the Miller Act, which it was entitled to assert forcefully, not timidly or apologetically, despite knowledge that its gain was MARK's loss.

Realistically, what difference would disclosure have made? Let us assume that in July 1987 CW disclosed to MARK that HARAKAS was a poor financial risk, that CW had just written off $110,098.54 as uncollectible HARAKAS debt, that CW had loaned to HARAKAS $150,000 in March 1986 (still unpaid), that out of $603,766.55 worth of materials supplied to HARAKAS for the Tech-Lab job, only $23,536 had been paid, that in 1985 CW had obtained a Security Agreement from HARAKAS

encumbering all his business assets, that a Deed of Trust on HARAKAS' residence had been taken by CW to secure the $150,000 loan, etc. What would MARK ultimately have done any different? The Miller Act rights would still be asserted by CW. MARK would still be in a squeeze, desperately in need of the custom made material yet to be delivered to HARAKAS in time to avoid harsh penalties to the government. MARK would doubtless have argued St. Paul rights, in vain. The end result would have been the same, an accommodation to both (payments to CW, and remaining material to MARK) with all legal rights reserved. Thus, if I am in error on the point of law, and a duty to disclose in fact existed on the part of CW, I conclude that breach of that duty caused no damage to MARK.

Accordingly, the contract of 7/27/87, both in its written and oral form, stands

as a valid agreement, along with the $510,000 payment pursuant thereto.

III. THE ST. PAUL CLAIM OF MARK

I have taken the liberty in this decision of labeling the rights of a general contractor to have a supplier of goods and materials to a subcontractor apply payments of the latter to the project to which the goods and materials were furnished as "St. Paul" rights. Correlatively, I have used the terms "St. Paul duty", "St. Paul obligation", and the like, at least in my own thinking. I shall use such terms herein as a shorthand description of the concept embodied in the St. Paul case, 309 F.2d 22, and in other earlier and later cases.

MARK asserts that throughout the period during which CW supplied electrical material to HARAKAS for the Tech-Lab job, CW knew that the periodic payments it was receiving from HARAKAS and applying to invoices for materials on other projects

had their source in monies paid by MARK to HARAKAS as Tech-Lab payments. In fact, MARK asserts an actual conspiracy on the part of both HARAKAS and CW to use such funds to pay other long-delinquent invoices of CW to HARAKAS relating to other projects, then lower the Miller Act boom on MARK for essentially the entirety of Tech-Lab charges. While that is precisely what occurred, the evidence does not support a conclusion that HARAKAS and CW actually conspired to bring about that result.

HARAKAS was heavily indebted to CW as far back as July 1985 ($269,000). A Security Agreement was then executed by HARAKAS, hypothecating all his business assets (including future accounts receivable) to CW to secure the debt. In the fall of 1985, CW learned of the upcoming Tech-Lab job and that it would mean some $900,000 of new purchases by HARAKAS from CW and the resulting mark-up

profit therefrom, together with $400,000 of net profit on the job to HARAKAS from which he could pay the old debt to CW. Mr. Chokan and Mr. Ghilarducci both looked expressly to the Tech-Lab job as the source of funds from which to pay the past invoices, and a fortiori to pay for the materials currently to be furnished for Tech-Lab. The debt grew rather than shrunk in the ensuing months and year, with $150,000 added to it by way of a loan in March of 1986 (secured by a junior Deed of Trust on HARAKAS' residence), and reached $636,000 in July 1986, at which time less than $100,000 of the monies owing was for material furnished on Tech-Lab. No noteworthy improvement in the overall debt is seen for another year, when by June 1987 the trade debt is $660,000 of which $524,000 is now Tech-Lab (and this does not include the $150,000 loan which is still unpaid). Throughout all this Chokan is periodically reviewing

HARAKAS' financial records including his receivables, presumably noting heavy progress payments by MARK to HARAKAS in May, September, November and December of 1986 and January to May of 1987. During this time period, CW is paid $550,000 by HARAKAS, delivers $600,000 worth of materials to him for Tech-Lab, and credits the Tech-Lab invoices with about $30,000.

One conclusion is inescapable. CW knew throughout the period March 1986 to July 1987 that very large sums of money ($550,000) were paid to it by HARAKAS, that very large sums of money were paid to HARAKAS by MARK ($1,150,000), and that $30,000 was applied by CW (at HARAKAS' express direction) to the Tech-Lab account. CW had <u>actual</u> knowledge, not mere constructive knowledge.

This factual conclusion would not have impressed me as giving rise to any legal liability of CW to MARK, as I explained to the parties at the hearing.

I would have felt that CW was legitimately protecting its own sole interests, while MARK could have done the same (through a bond requirement, e.g.). But the St. Paul doctrine instructs otherwise. It is not at all complicated. Its most simple statement is in Graybar v. Volpe (1967) 378 F.2d 55, 59 as follows:

> "...when a creditor comes into possession of funds under circumstances that he knows or is chargeable with knowledge that all or a portion of the source of such funds is from a general contractor on a public project, the creditor is bound to apply such funds to the job account of the principal or general contractor notwithstanding any direction he may receive from his payor."

Also from the same case, at page 58:

> "...where there is a finding of actual or constructive notice that the source of the funds from which payment is made is the general contractor, materialmen must apply such funds received to the Miller Act claim." (Emphasis added).

I have no choice but to follow the law as above set forth. As monies were

received from HARAKAS by CW, it was obligated to apply them to outstanding invoices on the Tech-Lab project. To the extend it did not do so, it damaged MARK as hereinafter described.

CW argues that all its trade accounts were and are secured, thus why should it be motivated to apply funds received to credit any specific account? The answer is that it is not true that all monies owed to HARAKAS were secured by Miller Act liens, mechanics' liens, stop notice liens, or otherwise. If that were so, why the need for the Security Agreement of 1985? Why did CW write off $110,000 in June 1987? For reasons not disclosed by the evidence, substantial trade account monies due from HARAKAS to CW were unsecured; and it was in CW's best business interest to cause them to be paid from whatever source available. Moreover, even with secured accounts, conceivably a supplier would prefer not to foreclose,

eschewing legal expense, unnecessary time and effort, good will and public relations, etc.

CW argues also that the only way the St. Paul doctrine can apply is by proof that the actual dollars paid to HARAKAS by MARK were used by HARAKAS to pay CW. In other words, CW would require MARK to trace the specific money from MARK to HARAKAS to CW. Such is not the St. Paul law.

> "But the decisions in those cases [Miller Act cases], and their significance for Miller Act purposes, are broader than the ability to identify funds as they pass from the prime to the sub to the supplier [Crane v. Johnson (67 F.2d 121)] does not restrict its observations to 'identical money'."

CW further argues that MARK failed to protect itself by requiring of HARAKAS a performance bond, joint fiscal control, etc. The St. Paul doctrine includes no such requirements and expressly recognizes

supplier liability in their absence (Consolidated v. U.S. 355 F.2d 437, 440).

The MARK claim for monies based on St. Paul considerations is therefore valid, and the calculations follow.

IV. THE CALCULATIONS

MARK would have me now make a broad application of the St. Paul doctrine by comparing the aggregate sums paid to CW by HARAKAS from March 1986 to June 1987 ($553,744.13), the aggregate sums paid to HARAKAS by MARK during the same period ($1,150,578.55), and the amounts credited by CW to the Tech-Lab account ($24,174). From this MARK would have me conclude that $529,570.13 more should have been credited to the Tech-Lab account; and since this exceeds the $510,000 paid in July 1987, the entire $510,000 should be awarded.

That's not the way St. Paul works. The concept is dynamic and requires application of funds as they are received. If when a payment from HARAKAS to CW is

made nothing has been paid to HARAKAS by MARK, there is nothing to credit. There is no duty to credit the Tech-Lab account in advance either for purchases later to be made or for MARK monies not yet disbursed. Each payment received by CW must be examined for the then-status quo, and an individual determination made.

Using Exhibit "G", I analyze each month's payments from HARAKAS to CW, and the status of the accident.

1. **March 1986**

No payment HARAKAS to CW. $638.30 due CW for material furnished. Nothing owed to MARK. Tech-Lab account entitled to St. Paul preference as to $638.30, when HARAKAS pays.

2. **April 1986**

Payment to CW from HARAKAS, $55,077.61. Deliveries to Harakas $100,001.01, plus $638.30 from March, total deliveries $100,639.31. Entire $55,077.61 should have been credited against the $100,639.31, leaving $45,561.70 for future St. Paul treatment. Owing to MARK from CW $55,077.61 as of this month.

3. **May 1986**

Payment to CW from HARAKAS $105,816.00. No deliveries, but a dollar credit of $1,518.95 against $45,561.70, reducing it to $44,042.75. Out of the payment, the entire $44,042.75 should have been credited, leaving nothing on which to

apply the remaining $61,713.25 -- CW is free to apply it per HARAKAS' direction. Owing to MARK from CW $44,042.75 for this month and $99,120.36 cumulative total.

4. **June 1986**

No payment to CW from HARAKAS, so nothing to apply. Deliveries to HARAKAS $122.88. $122.88 left for future St. Paul treatment. Cumulative St. Paul total owing to MARK from CW, still $99,120.36.

5. **July 1986**

No payment to CW from HARAKAS, so nothing to apply. Deliveries to HARAKAS $153.60. $276.48 left for future St. Paul treatment. Cumulative St. Paul total owing to MARK from CW still $99,120.36.

6. **August 1986**

Payment to CW from HARAKAS $57,263.09. Deliveries to HARAKAS $3,466.05, plus $276.48 from July, total $3,742.53, which should have been applied out of the $57,263.09, leaving $53,797.04 for CW to apply per HARAKAS' direction.

Owing to MARK from CW for this month, $3,742.53; and cumulative total owing $102,586.41.

7. **September 1986**

Payment to CW from HARAKAS $36,738.15. Deliveries to HARAKAS $378.97. $378.97 should have been applied to Tech-Lab, leaving $36,359.18 to apply per HARAKAS' direction. Owing to MARK from CW for this month $378.97; and cumulative total owing $102,985.38.

8. **October 1986**

No payment to CW from HARAKAS, so nothing to apply. Deliveries to HARAKAS $3,907.81, left for future St. Paul treatment. Cumulative total owing MARK from CW is still $102,985.38.

9. **November 1986**

No payment to CW from HARAKAS, so nothing to apply. Deliveries to HARAKAS $57,891.73, which together with the above $3,907.81 leaves a total of $61,799.54 for future St. Paul treatment. Cumulative

total owing MARK from CW is still $102,985.38.

10. **December 1986**

Payment to CW from HARAKAS, $26,199.45. Deliveries to HARAKAS $16,733.76. All $26,199.45 should have been applied to Tech-Bilt, leaving $52,333.85 for future St. Paul treatment. Cumulative total owing MARK from CW is now $129,184.83.

11. **January 1987**

Payment to CW from HARAKAS $45,683.42. Deliveries to HARAKAS $90,340.30. All $45,683.42 should have been applied to Tech-Bilt, leaving $96,990.73 for future St. Paul treatment. Cumulative total owing MARK from CW is now $174,868.25.

12. **February 1987**

Payment to CW from HARAKAS $25,409.47, of which $13,398 credited to Tech-Bilt, leaving $12,011.47 that should have been so credited. Deliveries to HARAKAS $3,009.88. $74,591.14 now left for future St. Paul treatment. Cumulative total owing MARK from CW is now $186,879.72.

13. **March 1987**

No payment to CW from HARAKAS, so nothing to apply. Deliveries to HARAKAS $201,041.50, increasing to $275,632.64 the amount for future St. Paul treatment. Cumulative total owing MARK from CW is nov still $186,879.72.

14. **April to June, inclusive 1987**

Payments to CW from HARAKAS $121,937 in April, $75,987.27 in May, and $3,632.07 in June. All should have been applied fully to Tech-Bilt invoices. This increases the total aggregate amount that should have been applied by CW to

$388,054.54. This is the amount of the award to MARK against CW, together with interest thereon at 10% per annum from and after 1/1/87, less the set-off of CW's claim determined in heading "I" above. This calculates to $232,832.70 of interest through 12/31/92, and total principal and interest of $620,887.24.

V. ATTORNEYS' FEES AND PUNITIVE DAMAGES

As we all know, attorneys' fees are not allowed to a civil litigant absent a contract or other special circumstances. Neither is present here. The closest anyone comes to a contractual basis for fees is a unilateral statement on each CW invoice to HARAKAS that attorneys' fees will be charged if timely payment is not forthcoming. This is insufficient. Before a litigant may be forced to pay his opponent's legal fees, he either must have agreed to pay them or been a party to a contract in which the other party agreed to pay them. Neither event took place

here. CW simply tried unsuccessfully to impose an attorney fee obligation on its purchasers.

Neither party is awarded attorney fees.

Both sides also have requested an award of punitive damages, at least so states the pre-trial order; their arguments in the briefing are somewhat equivocal, however. In any event, based on what I have indicated heretofore, there is no award of punitive damages to anyone.

VI. AWARD

After setting off $343,567.52 against $620,887.24, the net sum of $277,319.72 is hereby awarded to MARK against CW. This award includes interest through 12/31/92 and assumes that payment will not be forthcoming until that day comes and goes. The award shall be adjusted appropriately for the time involved between 12/31/92 and either payment of the award or its establishment as a judgment of this court.

Additionally, legally recoverable court costs are awarded MARK, to be determined by Cost Bill submitted to the arbitrator pursuant to Federal Court rules.

A further award is hereby given in favor of MARK and against HARAKAS and SONS ELECTRIC COMPANY, H & S ELECTRIC COMPANY, and NICHOLAS HARAKAS, individually, for $629,166 ($510,000 and $119,166), plus interest at 10 percent per annum from and after 7/1/87, and costs determined as above.

VII. RESERVATION OF JURISDICTION

Being perennially awkward with numbers and even more so with electronic calculators, I struggled mightily to achieve the dollar figures included in headings I, III and IV above. I very well may have erred in the figures. In addition, I note at pages 4, 5 and 6 of CW's Closing Brief a challenge to the accuracy of the figures contained in Exhibit "G". My analysis of Exhibit "2"

to the Reply Brief and the individual figures there described is that there is an additional $3,302.17 claimed to have been actually credited by CW to the Tech-Lab account. I am unable, however, to confirm this figure from the evidence, because I cannot distinguish in Exhibit "2" what is attributable to Tech-Lab and what is attributable elsewhere. For these reasons I reserve jurisdiction for the next sixty (60) days to correct any or all of the figures, either on my own motion or on motion of either party, provided that if no such written motion is delivered to me within twenty (20) calendar days from date hereof, this Decision and Award shall become final as herein rendered. I invite the parties to review carefully all of my figures, and do the calculations, and call any errors to my attention by timely written motion. Also, I am prepared to hold a further informal hearing with

counsel regarding any claimed inaccuracies in Exhibit "G".

Dated: December 7, 1992.

/s/ George E. Paras
GEORGE E. PARAS
Arbitrator